

² P.H. Trans. at 22.

without objection by claimant's counsel, determined that those portions of the deposition discussed will be considered for the purposes of this preliminary appeal.

ISSUE

Did the ALJ err in ordering respondent and its carrier to pay for claimant's psychological care, where the need for treatment was caused by and/or resulted from a separate intervening event?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was working as a butcher for respondent on February 18, 2006, when, as he was placing a "lug of meat" onto a grinder, he felt his back pop.³ He ultimately came under the care of orthopedic surgeon Kris Lewonaski, M.D. Claimant was diagnosed with a herniated disc at L5-S1 and underwent a laminectomy with discectomy and interbody fusion at that level. Claimant's injury is not disputed, and claimant was returned to work for respondent December 27, 2006, with restrictions. The record indicates that claimant was accommodated by respondent, but there was friction between claimant and his supervisor due to claimant's restrictions.⁴

On March 19, 2007, claimant went to lunch, taking two burritos from the deli for his lunch. Claimant failed to pay for the burritos and was called into the office after his lunch, and, after he admitted the infraction, he was fired. Claimant immediately sought and found employment with a local rancher, although at a substantial loss in wages. Claimant went from making \$12.00 per hour, with benefits, to making \$8.50 per hour, without benefits. This caused stress in his work and marriage. Claimant began developing depression due to his feelings of not being able to provide for his family and their inability to pay bills. Claimant also was forced to work long hours to pay the bills, adding to the stress in his family situation. Claimant sought psychological treatment for his depression. A dispute arose regarding the cause of claimant's need for psychological treatment with respondent contending the loss of claimant's job was the cause, while claimant alleges the injury caused the need for psychological treatment.

³ *Id.* at 6.

⁴ *Id.*, Resp. Ex. A.

Claimant was referred by his attorney to clinical psychologist Wesley C. Jones, Ph.D., for an evaluation on January 13, 2008. Dr. Jones notes in his report of that date that:

Since the surgery he has had consistent problems with depression as he was not able to maintain his employment and feels that he has failed his family.⁵

Dr. Jones recommended ongoing antidepressant medication and psychological testing be administered. Followup psychotherapy was also recommended with treatment to last for from six months to one year.

Claimant was then referred by respondent's attorney to psychiatrist Patrick L. Hughes, M.D., for an evaluation on April 1, 2008. Dr. Hughes found claimant's need for psychological treatment to stem from the termination and subsequent loss of income. This finding is, somewhat, consistent with claimant's testimony that his depression began with his loss of job.⁶ Claimant also expressed significant depression stemming from his inability to provide for his family. He also expressed puzzlement at the immediacy of the termination as he had not had any prior thefts or significant misbehavior at that job before the burrito incident. Dr. Hughes does note that claimant has had ongoing back and leg pain since the surgery. This causes him to be irritable as he "can't ever seem to get comfortable".⁷ The report also notes problems with falling asleep and staying asleep due to the pain. Nevertheless, Dr. Hughes determined that claimant's need for psychological treatment stems from the termination, and has no connection with the work-related injury. The need for ongoing medication and psychotherapy is echoed in Dr. Hughes' report.

As the result of the dispute regarding the cause of claimant's need for psychological treatment, claimant was referred by the ALJ to licenced psychologist James R. Eyman, Ph.D., for an independent psychological evaluation on June 13, 2008. Claimant provided Dr. Eyman with a long history of psychological abuse from his father and uncle. Claimant's life as a child could be described as troubled. The only positive interaction he recalled with his father was while working at his father's tire shop. He was told that hard physical labor makes you responsible and worthwhile.⁸ Dr. Eyman agreed that claimant's loss of job had a serious effect on his mental stability. However, he also noted that claimant was affected by the loss of ability to perform his job after the injury and resulting surgery. Claimant had reported problems with his supervisor stemming from the restrictions after the surgery. Claimant's wife reported that claimant became down after returning to work and realizing

⁵ *Id.*, Trans., Cl. Ex. 1.

⁶ *Id.* at 12-13.

⁷ *Id.*, Resp. Ex. A.

⁸ Dr. Eyman's independent psychological evaluation report of June 13, 2008, at 2.

that the injury and subsequent surgery impacted his job. Claimant also reported having difficulty sleeping due to the pain, and he had lost interest in doing normally enjoyable activities, again from the pain associated with this injury. Dr. Eyman found claimant's depression stemmed from both the injury and claimant's loss of job. He stated that "[h]owever, it is not possible to determine the degree to which each is contributing to his current psychological state."⁹

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-551(i)(1) states:

(i)(1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.¹⁰

Claimant's attorney, in his brief to the Board, cites numerous cases dealing with a substantial competent evidence level of Board review. While this standard of review applies to the appellate courts in Kansas, the Board's review of ALJ decisions is "de novo on the record".¹¹

⁹ *Id.* at 5.

¹⁰ K.S.A. 2007 Supp. 44-551(i)(1).

¹¹ *Borjas v. Optimus Corp.*, No. 1,029,233, 2007 WL 2296141 (Kan. WCAB July 31, 2007); *Batye v. Independence Corporate Offices*, No. 255,467, 2003 WL 359856 (Kan. WCAB Jan. 28, 2003); *Vontress v. Wal-Mart*, No. 264,317, 2005 WL 2519578 (Kan. WCAB Sept. 12, 2005); and *Hayes v. R & S Services*, No. 1,023,460, 2006 WL 1933444 (Kan. WCAB June 30, 2006).

Traumatic neurosis, following physical injury, long has been recognized as being compensable under the workmen's compensation laws, and the rule is applicable to such injury even though financial and other worries play a part.¹²

Furthermore, it is well-settled that the workmen's compensation act prescribes no standard of health for workmen, and where a workman is not in sound health but is accepted for employment, and a subsequent industrial accident suffered by him aggravates or accelerates an existing disease, or intensifies the affliction, he is not to be denied compensation merely because of such pre-existing condition.¹³

This claimant comes from a troubled background, with the only positive interaction between him and his father being connected with hard work. That claimant would be traumatized psychologically by the loss of his job is not a tremendous shock. Hard physical labor was the only thing which ever led to positive interaction with his father. However, here, the loss of the job is not the only factor affecting claimant's mental anguish. The injury suffered while working for respondent led to claimant being unable to properly perform his labors. This caused him emotional trauma, as noted by claimant's wife, and created conflict between claimant and his supervisor. The ongoing pain from the relatively unsuccessful back surgery has negatively affected his work and his ability to sleep. While the loss of his job stems from the termination, clear dissatisfaction and distress with his physical limitations preceded this job loss.

Kansas case law requires a causal link between the mental problems and the injury suffered at work in order to find the mental problems compensable.¹⁴ And as noted above, the existence of other contributing factors does not render the injury-related psychosis non-compensable. This Board Member finds that claimant has satisfied his burden of proving a causal connection between his physical injuries and the traumatic neurosis which he subsequently developed. The Order of the ALJ granting claimant ongoing medical treatment is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

¹² *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 114, 959 P.2d 469 (1998), citing *Morris v. Garden City Co.*, 144 Kan. 790, 62 P.2d 920 (1936) and *Barr v. Builders, Inc.*, 179 Kan. 617, Syl. ¶ 4, 296 P.2d 1106 (1956) .

¹³ *Id.* at 114, citing *Strasser v. Jones*, 186 Kan. 507, 350 P.2d 779 (1960).

¹⁴ *Nelson v. Capital City Moving & Storage*, 32 Kan. App. 2d 566, 85 P.3d 728 (2004).

¹⁵ K.S.A. 44-534a.

CONCLUSIONS

Claimant has proven, for preliminary purposes, that his ongoing need for psychological treatment stems, at least in part, from the injuries claimant suffered while working for respondent on February 18, 2006. The Order granting ongoing medical treatment is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Brad E. Avery dated August 29, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

HONORABLE GARY M. KORTE

c: Michael G. Patton, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge